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SUPREME COURT
OF THE
UNITED STATES.

October Term, 1937
No. [redacted] 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON, and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

WM. H. NEBLETT,
R. DEAN WARNER,
1009 Transamerica Bldg., Los Angeles, Cal.,
Counsel for Petitioners.

ALFRED F. MACDONALD,
ALLAN H. MCCURDY,
VERNON BETTIN,
Of Counsel for Petitioners.

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SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, RUPERT B. TURNBULL, et al., for themselves and for other noncancellable policyholders similarly situated and for FRANCIS ADAMS for himself and for other non-cancellable policyholders similarly situated; GEORGE W. MANIERRE and B. ROBERT GETTS on their own behalf and on behalf of all similarly situated policyholders; MARSHALL D. HALL and JOSEPH C. McMANUS on behalf of themselves and other holders of non-cancellable income policies; NEIL S. McCARTHY on his own behalf, RALPH R. HUESMAN and BROADTOWN INVESTMENT COMPANY, a corporation; DR. ARTHUR B. ALLEN, et al.; DAVID LYNN OPENSHAW, et al.; HENRY B. SENN; HERBERT E. FRESTON; ROBERT J. WEBB and PHILIP M. KLUTZNICK for themselves and all other persons similarly situated; R. RABINOWITZ; ROSCOE R. HESS; G. C. PARSONS, J. A. MARVIN and G. R. SNIDER, et al., on behalf of themselves and all other holders of non-cancellable policies, and as members of a protective committee for holders of non-cancellable income policies; AUSTIN O. MARTIN and REX HARDY; WILLIAM A. SULLIVAN, Insurance Commissioner of the State of Washington; ARTHUR E. WHITE; GEORGE I. COCHRAN, et al.; WILLIAM A. BECKETT, et al.; ARTHUR D. WUNNER; C. N. WESLEY, et al.; WILBUR G. KATZ, et al.; CARL C. KATLEMAN, et al., for himself and all others similarly situated; ANDREW J. COPP, JR.; RALPH C. HAMLIN; ROWE SANDERSON, et al.; ROBERT CASAMAJOR, et al.; BEN S. HUNTER; CLARA M. GARUNAN, et al.; JOHN P. OLIVER; HAROLD S. COOK, et al.; EDWIN JANSS, et al.; E. A. CONWAY, Secretary of State of Louisiana; CARROLL C. DAY, HARRY C. FABLING, JOSEPH M. GANTZ, JACK PASCHALL and RALPH J. WETZEL; J. PARKER EVANS, on behalf of himself and all other holders of active life non-cancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Wm. H. Neblett, Vernor Bettin, William George Dickinson and Alfred F. MacDonald respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioners, who are policyholders[1] in an insolvent life, accident and health insurance company, pray that this Court review a decision of the Supreme Court of California, the court of last resort in that state, affirming a series of void orders made by the lower court in a special proceeding, had under the Insurance Code of the state, on application of its Insurance Commissioner, to reorganize the insolvent insurance company.

The Federal questions of lack of due process under the 14th Amendment to the Federal Constitution, of the impairment of the obligation of contract under Article 1, Section 10, of the Federal Constitution, and of the denial of the equal protection of the law, were raised and urged throughout the proceedings in the lower and highest state courts.[2] The lower court's rejection of these Federal questions was considered and affirmed by the upper court.[3]

The insolvency provisions of the Insurance Code of California were adopted in 1935.[4] Less than a year after

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[1]R. 245; R. 626; R. 681; R. 690; R. 1233.

[2]R. 245-251; R. 626-630; R. 681-687; R. 990-995; R. 1233-1236; R. 1274-1276; R. 1509-1544.

[3]R. 1509-1544.

[4]In effect September 15, 1935, Statutes 1935, Chapter 145.

the new Code went into effect, and on July 22, 1936, the Pacific Mutual Life Insurance Company of California was reorganized under the new law by Insurance Commissioner Samuel L. Carpenter, Jr., acting as liquidator under a void court order of appointment, into another company called Pacific Mutual Life Insurance Company. The two companies will be referred to in this petition as the old and new companies. Both are California corporations.

The old company was organized in 1868.[5] It prospered, spreading into forty-three states, so that at the time the Insurance Commissioner declared it to be insolvent[6] it had 300,000 policyholders of all classes holding policies insuring them for approximately $700,000,000, and had admitted assets, of a tangible character, of $215,000,000.[7]

There is no provision in the California Insurance Code for the reorganization of an insolvent insurance company. The reorganization was accomplished here by naming it "rehabilitation," which is mentioned in the Code.[8] The method of reorganization was simple. On July 22, 1936, Samuel L. Carpenter, Jr., Insurance Commissioner of California, filed a petition in the Superior Court of Los Angeles, California,[9] praying that he be appointed con-

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[5]R. 1535.

[6]July 22, 1936.

[7]R. 63-64; R. 1534-1535.

[8]California Insurance Code, Sec. 1043, Appendix p. 64.

[9]The Superior Court is the lower court of general jurisdiction in California.

servator of the old company[10] under the Code.[1] To his application the Commissioner attached the regular tri-annual convention examination made by the insurance commissioners of California and six other states.[2] Their report was dated July 21, 1936, but was made as of December 31, 1935.[3]

Although "mutual" is a part of the name of both companies, indicating that they are non-profit organizations conducted for the benefit of the policyholders, they are ordinary stock corporations. The several classes of policies issued by the old company were participating life, accident and health, and non-cancelable income accident and health.[4] The non-cancelable income accident and health policies are referred to throughout the proceedings as "non-cans."

The report of the convention examiners showed the company to be in excellent condition except in the non-can department. It was determined on July 21, 1936, that the latter department had, on December 31, 1935, a $23,000,000 deficit in its reserves, which in the report of the convention examiners was said to make the whole company insolvent.[5] The insolvency was reached by the application of an arbitrary actuarial coefficient to the non-can policies, never before used by the actuaries of the company, or by prior convention examiners. The

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[10]R. 1-9.

[1]California Insurance Code, Sec. 1011, Appendix p. 59.

[2]R. 11-32.

[3]R. 12.

[4]R. 63-64.

[5]R. 30.

convention examiners concluded from the application of their arbitrary formula that the premiums collected in the non-can department were insufficient to provide the necessary reserves to meet the risks in that department as they matured in the future.[6] The intangibles, such as the value of agency organizations, goodwill and the like, were not taken into account, although they were found by the court to be worth many millions of dollars.[7]

The other departments showed a surplus of nearly $5,000,000.[8] The actuarial deficit of $23,000,000 from the non-can department was applied to the whole company, wiping out the surplus of $5,000,000 and making the company insolvent by $18,000,000.[9]

The reorganization, which by necessity must have been planned in advance for months, was accomplished in a few moments. The Insurance Commissioner filed in the Superior Court his petition to be appointed conservator of the old company. With the consent of the old company, he was immediately appointed, and title to all of the assets of the old company attempted to be vested in him by a void order of a disqualified judge.[10]

Immediately thereupon and coincident thereto, and as a part of the same proceeding, the Commissioner filed

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[6]R. 11-32.

[7]R. 1386.

[8]R. 31.

[9]R. 31.

[10]R. 1526-1527. Judge Douglas L. Edmonds who made the orders was the owner of a life policy in the old company. R. 323.

another application claiming that his efforts as conservator were futile and praying that he be appointed liquidator.[1] With the consent of the old company, his petition was immediately granted by the entry of another void order.[2] On other petitions filed at the same time the court, by additional void orders,[3] approved the organization of the new company, the issue of all of its stock to the Commissioner, for which he paid $3,000,000 from the cash of the old company, and the Commissioner's reorganization plan, called a "Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement."[4] This latter document is the whole plan of reorganization. The Commissioner and the old company transferred to the new company all of the assets of the old company except the non-can policies and some rights of action it claimed to hold against derelict directors and officers. All of the above took place and was consummated in a single and continuous proceeding lasting only a few minutes. The non-can policyholders, whose deficit in arbitrarily assumed actuarial reserves had been applied in wrecking the old company, were to be permitted to come into the new company upon accepting the plan and agreeing to keep up the old premium rates and to accept a reduction of benefits on their policies running from 10 to 80 per cent.[5] At the same time Carpenter, as liquidator, joined with

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[1]R. 39-46.

[2]R. 49; R. 1526-1527.

[3]R. 1526-1527.

[4]R. 63-102.

[5]R. 82-83.

the old company in making the conveyance required by the reorganization agreement.[6]

All orders of the court made at that time were absolutely void[7] and no other plan of reorganization has ever been submitted or approved by the court, nor was any other conveyance of the assets ever made.

A board of directors was immediately selected for the new company, officers elected, and it has ever since that time functioned as a separate entity, discharged from all supervision of the Commissioner except that general supervision which he exercises over all insurance companies in the state.

After the reorganization was completed, the court on the following day, by a void order, directed all policyholders and stockholders of the old company to appear and show cause, within a time limited, why the court should not approve the plan of reorganization it had already approved, which plan was functioning through the sale and transfer of assets to the new company. The Commissioner had conveyed everything he had to the new company, and it was operating as a single entity.[8]

Notice of the order to show cause was given by mail to the stockholders and policyholders, and was published in newspapers generally throughout California. Within the time limited by the court, numerous objectors—among them being the petitioners herein—filed their objections to the plan and moved the court to set it aside upon many grounds, including fraud, lack of jurisdiction of the court,

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[6]R. 183-192.
[7]R. 1526-1527.
[8]R. 226-232.

disqualification of the judge who sat, denial of due process under the 14th Amendment to the Federal Constitution, violation of the contract clause of Article 1, Section 10, of the Federal Constitution, and that the Insurance Code itself was unconstitutional.[9]

About three weeks after the reorganization was completed by the void orders of the court, the case was transferred from Judge Edmonds to a qualified judge, Honorable Henry M. Willis.[10] The void orders of Judge Edmonds, made in the lower court, have never been set aside. They stand unimpaired at the moment, affirmed by the highest state court.[1]

On August 11, 1936, Judge Willis made an order attempting to confirm the previous void orders of Judge Edmonds.[2] The case then moved along without incident until September 25, 1936, when Judge Willis, on application of the Commissioner, issued an order to show cause why an amended plan should not be approved *nunc pro tunc* as of July 22, 1936, the date of the void approval of the reorganization by Judge Edmonds, and directed notices of the order to be given to the policyholders and others interested.[3]

The amended plan was the same as the one already approved, with unimportant differences not affecting the policyholders of any class. Many persons interested filed

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[9]R. 233, 329, 681, 684.

[10]R. 323.

[1]R. 322-328. See final order of Judge Willis, R. 1387; R. 1378-1395; R. 1509-1544.

[2]R. 322-328.

[3]R. 905-913.

objections similar to the ones already on file. The Federal questions of lack of due process, and of the impairment of the obligation of contract were again raised.[4]

The lower court held, after a hearing, that the Commissioner's discretion as conservator was supreme and that it was something which the court was powerless to control or guide.[6] The amended plan was again approved on December 4, 1936, but the order was, as before, *nunc pro tunc*, approving the reorganization as of the 22nd day of July, 1936, and making the amended plan effective as of that date.[7] The void orders of Judge Edmonds were reconfirmed. Those void orders are the sole foundation for the proceeding. Without their confirmation the whole proceeding falls. The Supreme Court of California affirmed the whole proceeding in the lower court, rejecting as inapplicable the Federal questions raised.

"This intervenor objects to paragraphs 1 to 9 of the order to show cause, and all amendments thereto, on the ground that if the court should adopt all or any of the proposals set forth in paragraphs 1 to 9 of the order to show cause, it would be a denial of due process of law guaranteed to citizens of the United States by the Fifth and Fourteenth Amendments to the Federal Constitution.

"This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with The Pacific Mutual Life Insurance Company of California."

(Similar objections were made by practically all of the other objectors to the plan.) R. 1275; 1235.

[6] R. 1501.

[7] R. 1378-1395; R. 1396-1444.

B.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of California held that title to all of the assets of the old company (Pacific Mutual Life Insurance Company of California) was lodged in the new company (Pacific Mutual Life Insurance Company) on July 22, 1936, by the Commissioner's conveyance made pursuant to the void orders of the lower court. Section 1011 of the Insurance Code of California[1] provides the only method by which title to the assets of an insolvent insurance company may be vested in the Insurance Commissioner. A valid court order is necessary. The order must be made on a petition of the Commissioner showing that the company is, at the time of the filing of the petition, insolvent or in a hazardous condition. The Insurance Commissioner of California alleged in his sworn petition filed on July 22, 1936,[2] that the old company was insolvent as of December 31, 1935,[3] a date seven months prior to the time of the filing of the petition. Nothing is said about insolvency or hazardous condition on July 22, 1936.

In proceedings of this kind for the forfeiture of title the statute giving the state that right must be strictly construed.[4] Due process was not accorded here because

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[1]Appendix p. 59.

[2]R. 32.

[3]R. 3.

[4]*McDonald v. Katz*, 31 Cal. 167, 169; *Daman v. Hunt*, 47 Cal. App. 274, 280, 281; *Murray v. American Surety Co. of N. Y.* (C. C. A. 9), 70 Fed. 341, 346.

the petition alleging insolvency at a time seven months prior to its filing gave the court no jurisdiction to proceed. It was the only evidence the court had before it when it made the void order of July 22, 1936, and the so-called reappointment and revesting title order of August 11. The remedy is purely statutory. The attempt of the court to appoint a conservator and then a liquidator, vesting the title of the properties in him on this petition was in excess of the statutory remedy, even if the order had not been void. In so vesting title, the state court has decided a Federal question of due process under the 14th Amendment to the Federal Constitution not heretofore determined by this court, and has decided it in a way probably not in accord with an applicable decision of this court.[5]

2. The court (Judge Douglas L. Edmonds) made the order of July 22, 1936, purporting to vest title in the Insurance Commissioner, but that order, as well as all of the orders made by Judge Edmonds, were void because of his disqualification, brought about by his ownership of a policy in the old company.[6]

The Insurance Commissioner immediately organized his new corporation and made a conveyance of the title and possession which he had purportedly acquired, to the new company. Since that time nothing has ever been done to get the title out of the new company or into the old one. The Supreme Court of California, in confirming

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[5]*East Tenn. V. & G. R. v. So. Tel. Co.*, 112 U. S. 306, 310.

[6]R. 1526-27.

this title in the Insurance Commissioner, gained by the void orders of the court, has decided a new and novel question which has never before been decided by this court, namely, that a state may, under its police power, take title to private property in one of its administrative officers, through a court order, required by the statute under which the proceedings are held, although the order vesting the title is void. No decision of this court has been found determining the specific question of due process in issue where title is transferred through a void order of court.

There are many decisions of this court holding that a transfer under a void contract gives the transferee no title.[7] No rational distinction can be made between the effect of a void contract between private parties and a contract which grows out of a court order in a proceeding in which the state is a party, where an order is required to bring the contract into being. The Supreme Court of California has decided this case in a way probably not in accord with the numerous applicable decisions of this court, construing the effect of void contracts between private parties.

3. There is another line of decisions of this court applicable to the question of title with which the decision of the Supreme Court of California is not in accord. Those decisions hold that there is no civil right or legal

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[7] *Desmare v. U. S.*, 95 U. S. 605, 611; *Hall v. Coppell*, 7 Wallace 542, 558; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733; *Meguire v. Corwine*, 101 U. S. 108, 111.

remedy for an illegal act.[8] There are many prior cases in California which are directly in accord with these decisions of the Supreme Court.[9] The Supreme Court of California has held that all of the orders made in consummation of the reorganization were absolutely void.[10] The purported approval of these void orders by the lower state court, and the affirmance of them by the Supreme Court of California, could not make the orders valid in light of the California court's own decisions.[1]

4. At the time of the reorganization, the life policy of petitioner Neblett, along with all of the other similar policies, were transferred to the new company and a new contracting party substituted by void court order in place of the old company. The contracts of petitioners Bettin, Dickinson, MacDonald and all other non-can policyholders were left in the old company, but their terms were changed by the void orders approving the contract of reorganization. The policies of the petitioners, as well as those of most of the policyholders in the old company, were in effect before the new California Insurance Code was adopted.

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[8]*Bank of U. S. v. Owens,* 2 Peters 527, 538, 539; *Pullman Palace Car Co. v. Central Transportation Co.,* 171 U. S. 138, 151.

[9]*Union Collection Co. v. Buckman,* 150 Cal. 159, 165, 166; *Levinson v. Boas,* 150 Cal. 185, 193, 194, 195; *Morey v. Paladini,* 187 Cal. 727, 733.

[10]R. 1526-27.

[1]*Ball v. Tolman,* 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123.

The obligation of the contracts of all of the policyholders with the old company were impaired by the reorganization of the old company under the void orders of the court within the meaning of Article 1, Section 10, of the Federal Constitution. That question has not heretofore been determined by this court and has been decided by the Supreme Court of California in a way probably not in accord with applicable decisions of this court.[2]

5. The Supreme Court of California held in following a provision in the plan of reorganization: "Any life policyholder not assenting to the plan was to file a claim with the Commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but disability payments on such policies were to be assumed on a basis of from 20 per cent to 90 per cent of the face of such policies, depending upon the year of issue. * * * Non-consenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all [fol. 1516] allowed claims to be assumed by the new company as provided in the agreement."[1]

The court further affirms the same point, saying, "All the dissenter is entitled to is the equivalent of what he would receive on liquidation."[2]

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[2]*Coombes v. Getz*, 285 U. S. 434, 440, 441; *N. W. Pac. Railroad v. Minn.*, 208 U. S. 583, 591.

[1]R. 1520.

[2]R. 1539.

The effect of the holding of the Supreme Court is to decide that the dissenting policyholder is entitled to nothing. No liquidator was ever appointed for the old company. Judge Edmonds did appoint the Insurance Commissioner liquidator at the reorganization date, July 22, 1936, but that order was held to be void.[3]

The record does not show how many policyholders, if any, ever assented to the plan.[4] It can be assumed, in view of the record, that all of the individuals and groups who opposed the plan in the lower court are standing by to see what happens on appeal and that they have never assented to the plan. In the lower court, all persons interested were purportedly represented, either singly or by group-representation.[5]

It appears that no process of law was accorded one who dissented. He had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim. The holding is probably not in accord with applicable decisions of this court herein cited, and the question is one of importance, not heretofore determined by this court.

6. The Supreme Court of California has held that under §1043 of the Insurance Code of California which provides that the Commissioner as conservator or liquidator "may, subject to the approval of the court,

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[3]R. 1526-27.

[4]The appeal was taken to the Supreme Court of California within a few days after the order was made. R. 1446.

[5]R. 1514-1516.

* * * enter into rehabilitation agreements" was sufficiently definite and certain to permit of the reorganization of the Pacific Mutual Life Insurance Company of California as done by the Commissioner. The phrase giving the Commissioner the power "to enter into rehabilitation agreements" is so vague and uncertain, open to so many constructions and permits of so many different interpretations by reasonable men, that the reorganization of a corporation under that power by the Commissioner is a question which has never been decided by this court, and is not in accord with probable applicable decisions of this court.[6] In construing what the Commissioner could do under the power given him in the Insurance Code to enter into rehabilitation agreements, the Supreme Court of California went beyond any powers that might even be imputed or inferred by any reasonable person from that phrase when it held that the vague and uncertain phrase gave the Commissioner power to delegate his authority to a corporation deputized as his agent to perform all his powers of liquidation for him.[7]

7. Even more important than the reasons already set out for granting this writ is the great public importance

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[6] *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458-464; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 238-242; *Connally v. General Construction Co.*, 269 U. S. 385, 391, 392; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054, 1056.

[7] *Schechter v. U. S.*, 295 U. S. 495, 529-540; *Hentschel v. Fidelity & Deposit Co of Maryland* (C. C. A. 8), 87 Fed. (2d) 833, 839; *Levezey v. Gorgas*, 4 Dall. 71, 74, 75.

of the case. The Pacific Mutual Life Insurance Company of California had 3,000 stockholders, 300,000 policyholders, $215,000,000 in tangible assets, many millions in intangibles, and approximately $700,000,000 in insurance.

The Company did business throughout the United States, with about 210,000 of its 300,000 policyholders in states other than California.

While these figures are large, the company itself was only sixteenth in size in the United States:

Life insurance is a subject which affects the general public more than any other business. It is the most important business because, through it, heads of families prepare for the maintenance, education and upbringing of their children and the protection of their widows after the death of the insured.

There are about 260 life insurance companies in the United States. They have insurance outstanding of $110,000,000,000, a sum equal to about half of the national wealth, on the lives of most of the wage earners in the country. Annual premiums are paid into these companies of $5,650,000,000, which, in comparison to other great things of interest, is one-third of the cost of the last war to this country, and is approximately one-sixth of the present national debt.

The effect of the decision of the Supreme Court of California is to make it possible in any state in which an insurance company is organized for profit, although doing business under the deceptive name of "mutual," to make as many contracts as its management may devise, but always with the power to impair or destroy these contracts without any process of law and without the observance of the forms of law. That is what has been

done here. The decision sets a precedent which in effect makes an Insurance Commissioner a dictator, determining by a fiat of discretion, based on present expediency, the rights of policyholders in their property. He is, under laws of each state, a political appointee with all the attendant circumstances of influence that go with such an office. If this writ of certiorari is not granted and this decision is allowed to stand, it will become a precedent throughout the United States affecting the fortunes of more than half the people.

It was proudly declaimed in argument before the Supreme Court of California that the Insurance Commissioners of practically all of the states in the United States had approved, fostered and helped effect this plan. It is to be assumed that the commissioners in other states will not be loath to accept the great dictatorial powers, vested in them by the decision of the Supreme Court of this state. Particularly important is the fact that insurance companies are not eligible to liquidation through the Bankruptcy Law of which the reorganization provisions of 77-B are an integral part.[8] In the present state of the law, there is no place for relief but this court.

The decision is so far wrong that, where the California Insurance Code does not give the definite power to do what was done here, the Supreme Court of California

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[8]*Callaghan v. R. F. C.*, 297 U. S. 464, 467; Bankruptcy Act, §4 11 U. S. C. 22; *In re Union Guarantee & Mortgage Co.*, (C. C. A. 2) 75 Fed. (2d) 984, 985.

draws upon some alleged implied powers held to be conferred by the Code. Such implied powers have never before been accorded by the courts to an administrative officer of a state acting in a special statutory proceeding. The Supreme Court of California has gone so far afield in opposition to the accepted principles of law regulating statutory proceedings that a reversal by this Court is vital to the future of the country, in order to prevent this decision from becoming a precedent, and from being used, as such, to destroy the rights of policyholders in insurance companies both in California and in other states of the nation.

It is claimed in the briefs and mentioned in the opinion that the petitioners are the only ones who have appealed. That shows what lengths have been resorted to in order to sustain the decision of the lower court. Due process was not accorded if the contracts of insurance were impaired or if title was forfeited through void orders. The Supreme Court of California says that the orders changing title were void. We agree. These petitioners who are proceeding on behalf of themselves, and all policyholders similarly situated, bring the whole subject to the attention of this court. All of the persons and groups of persons who appeared in the court below are parties to the appeal and are parties to this petition. In the event of a reversal of the judgment, they will obtain all the benefit that would have redounded to them had they appealed.

In this connection, a practical point should be considered. A glance at the record will show that it costs much

more to print it than the average size of the policies in force. The policyholders are unorganized. They cannot be welded into a group, because the insurance company and the Commissioner, in the situation this commissioner finds himself, guard with the greatest secrecy the list of policyholders. Besides, if we have reached that point in our judicial history where, as indicated by the Supreme Court of California, rights are based upon the number of persons who urge them, and not upon the principles of law involved, constitutional government is but a memory, instead of a right.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. L. A. 16182, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner and respondent, v. The Pacific Mutual Life Insurance Company of California (a corporation); and the Pacific Mutual Life Insurance Company (a corporation), respondents; William H. Neblett, Vernon Bettin and William George Dickinson, appellants and respondents; Charles Ross Cooper, Rupert B. Turnbull, *et al.*, for themselves and for other non-cancellable policyholders similarly situated and for Francis Adams for himself and for other non-cancellable policyholders

rly situated; George W. Manierre and B. Robert
on their own behalf and on behalf of all similarly sit-
policyholders; Marshall D. Hall and Joseph C. Mc-
s on behalf of themselves and other holders of non-
lable income policies; Neil S. McCarthy on his own
, Ralph R. Huesman and Broadtown Investment
ny, a corporation; Dr. Arthur B. Allen, *et al.;*
Lynn Openshaw, *et al.;* Henry B. Senn; Herbert E.
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lves and all other persons similarly situated; R.
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. R. Snider, *et al.,* on behalf of themselves and all
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al.; Wilbur G. Katz, *et al.;* Carl C. Katleman, *et al.,*
nself and all others similarly situated; Andrew J.
Jr.; Ralph C. Hamlin; Rowe Sanderson, *et al;*
Casamajor, *et al.;* Ben S. Hunter; Clara M.
an, *et al.;* John P. Oliver; Harold S. Cook, *et al.;*
Janss, *et al.;* E. A. Conway, Secretary of State of
ana; Carroll C. Day, Harry C. Fabling, Joseph M.
Jack Paschall and Ralph J. Wetzel; J. Parker
on behalf of himself and all other holders of active
n-cancellable income policies issued in the State of
na who may wish to join with him in the proceeding,

respondents; and No. 16222, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California (a corporation), respondent; Alfred F. MacDonald, appellant and respondent; Charles Ross Cooper, *et al.*, respondents, and that the said decree of the Supreme Court of the State of California may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WM. H. NEBLETT,
VERNON BETTIN,
WILLIAM GEORGE DICKINSON and
ALFRED F. MACDONALD,
Petitioners.

By WM. H. NEBLETT and
R. DEAN WARNER,
Counsel for Petitioners.

ALFRED F. MACDONALD,
ALLAN H. MCCURDY,
VERNON BETTIN,
Of Counsel for Petitioners.

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1937

No. .....

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON, and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Supreme Court of California is not yet reported. It is printed in the advance opinions of that court, under the title, *Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, v. Pacific Mutual Life Insurance Company of California, et al.* (94 Cal. Dec. 681). It is printed in the record.[1] The lower court rendered an opinion which is not reported, but is printed in the record.[2]

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[1] R. 1509-1544.

[2] R. 1469-1506.

II.

Jurisdiction.

1. The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended by Act of Congress, February 3, 1925. (U. S. C., Title 28, Section 344(b).)

2. The date of the judgment of the Supreme Court of California to be reviewed is December 7, 1937.[3] A petition for rehearing was filed. It was denied January 6, 1938.[4] The judgment of the Supreme Court of California then became final.[5]

3. The case arose out of a reorganization of the Pacific Mutual Life Insurance Company of California in a special proceedings in the courts of California, had under §§1011, 1012, 1013, 1014, 1015, 1016, 1037, and 1043 of the Insurance Code of California.[6] The only issue outside of constitutional questions, federal and state, tried or heard by the lower court, and affirmed by the Supreme Court of California, was whether or not the Insurance Commis-

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[3]R. 1509.

[4]R. 1545.

[5]*Morse v. United States*, 270 U. S. 151, 153, 154

[6]The sections of the California Insurance Code referred to, as well as all other California statutes cited in this brief, are printed in the appendix.

sioner's plan of reorganization was fair and reasonable.[7] The jurisdiction of this Court to grant certiorari is sought because the decision of the Supreme Court of California has denied to the petitioners and all other policyholders similarly situated, due process of law under the Fourteenth Amendment to the Federal Constitution, and has impaired the obligation of their contracts, as prohibited in Article 1, §10 of the Federal Constitution.[8]

4. It is believed that the following cases sustain the jurisdiction of this Court to grant certiorari: *Coombes v. Getz,* 285 U. S. 434; *Whitfield v. State of Ohio,* 297 U. S. 43; *Miller v. McLaughlin,* 281 U. S. 261; *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Green County, Pa.,* 284 U. S. 23; *Doty v. Love,* 295 U. S. 64; *Citizens National Bank of Cincinnati v. Durr,* 257 U. S. 99; *O'Neill v. Leamer,* 239 U. S. 244; *Hartford Life Insurance Co. v. Dowds,* 261 U. S. 476.

III.

Statement of the Case.

A full statement of the case has been given under the heading "A" in the petition. In the interest of brevity, it will not be repeated at this point.

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[7] "That the plan embodied in said rehabilitation and reinsurance agreement, Exhibit 'A,' is feasible, and that operations under said agreement are feasible.

That said rehabilitation and reinsurance agreement, and the plan embodied therein, are, and each of them is, fair, just and equitable."

(Findings by Court-Final Order, Dec. 4, 1936, R. 1386-7.)

[8] *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 680.

IV.

Specification of Errors.

1. The Supreme Court of California erred in holding that due process under the Fourteenth Amendment to the Federal Constitution had been accorded to the policyholders of the old company when their title was forfeited on a petition of the Insurance Commissioner, which petition did not vest jurisdiction in the court.

2. The Supreme Court of California erred in holding that due process was accorded under the Fourteenth Amendment to the Federal Constitution to the policyholders of the old company in forfeiting title of the company and its policyholders to the property and assets of the company by void orders of the court.

3. The Supreme Court of California erred in holding that due process was accorded under the Fourteenth Amendment to the Federal Constitution to the policyholders of the old company when reorganization of the old company was had under the vague and uncertain provision of the Insurance Code of California, giving to the Insurance Commissioner the right "to enter into rehabilitation agreements."

4. The Supreme Court of California erred and denied due process under the Fourteenth Amendment to the Federal Constitution to the petitioners and all other policyholders of the old company in deciding that the Commissioner may delegate the authority, vested in him by statute, to a new corporation as his agent.

5. The Supreme Court of California erred in holding that the policyholders' contracts in the old company were not impaired within the meaning of Article I, Section 10, of the Constitution of the United States, when the terms and provisions of these contracts were changed, both as to substance and parties, by void orders of the court.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

The Supreme Court of California Denied the Petitioners and All Other Policyholders of the Pacific Mutual Life Insurance Company of California Due Process of Law, Under the Fourteenth Amendment to the Federal Constitution, When It Held That the California Courts Acquired Jurisdiction of the Pacific Mutual Life Insurance Company of California and Its Policyholders, on a Petition Which Did Not State Facts Required By the Insurance Code of California to Give the Courts Jurisdiction, and When It Held That Title to the Assets Belonging to the Insurance Company and to Its Policyholders Could Be Vested in the Insurance Commissioner and By Him Transferred to a Reorganized Company on Authority of Court Orders Which Were Absolutely Void.

POINT A.

The California courts never acquired jurisdiction of the Pacific Mutual Life Insurance Company of California, the old company.

Murray v. American Surety Co. of N. Y. (C. C. A. 9), 70 Fed. 341, 346; *Smith v. Westerfield,* 88 Cal. 374, 378; *East Tennessee V. & G. R. Co. v. Southern Tel. Co.,* 112 U. S. 306, 310; *McDonald v. Katz,* 31 Cal. 167, 169; *McAllister v. Story,* 7 Cal. 428, 431; *Daman v. Hunt,* 47 Cal. App. 274, 281; §1011 *California Insurance Code.*

POINT B.

All of the orders made by the court affecting title to the assets of the insurance company and approving their transfer to the reorganized company were void because of the disqualification of the judge who made the orders.

California Civil Code, §305; *Lindsay-Strathmore I. Dist. v. Superior Court,* 182 Cal. 315, 333; *McClaughry v. Deming,* 186 U. S. 49, 67, 68; *Oakley v. Aspinwall,* 3 N. Y. 547, 552; *Marin M. W. Dist. v. North Coast W. Co.,* 178 Cal. 324, 328.

POINT C.

The Supreme Court of California erroneously held that the void orders of Judge Edmonds could be approved, and that the reorganization under these void orders could be validated by subsequent approval.

Ball v. Tolman, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123; *E. Bement & Sons v. Nat. Harrow Co.,* 186 U. S. 70, 88; *Hall v. Coppell,* 7 Wall. 542, 558; *California Insurance Code,* §1011.

POINT D.

Judge Edmonds' orders were all illegal and void because he was prohibited by the California statute from sitting or acting in the case.

Hall v. Coppell, 7 Wall. 542, 558; *California Code of Civil Procedure,* §170; *Bank of U. S. v. Owens,* 2 Pet. 527, 538; *Meguire v. Corwine,* 101 U. S. 108, 111; *Desmare v. United States,* 93 U. S. 605, 611; *Miller v. Murphy,* 186 Cal. 344, 347; *Jones v. Union Oil,* 218 Cal. 775, 778.

POINT E.

The subsequent orders of a qualified judge confirming the void orders still deny due process.

Tumey v. Ohio, 273 U. S. 510; *Ball v. Tolman*, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 123; §§1011 & 1043, *California Insurance Code*.

POINT F.

The Commissioner had no authority to make, nor the California courts jurisdiction, to approve a delegation of his duties as conservator or liquidator to a corporation.

§2, Chap. 317, Acts of the Legislature of 1915; *Schechter v. United States*, 295 U. S. 495; *Hentschel v. Fidelity & Deposit Co. of Maryland* (C. C. A. 8), 87 Fed. (2d) 833, 839; *Levezey et al. v. Gorgas et al.*, 4 Dall. 71, 74, 75.

POINT G.

The power to reorganize cannot be implied from the right of the Commissioner as conservator to enter into rehabilitation agreements.

New York Title & Mtg. Co. v. Freedman, 276 N. Y. S. 72; *In re Title & Mtg. Guarantee Co.*, 274 N. Y. S. 270; *In re Title & Mtg. Guarantee Co.*, 275 N. Y. 353.

POINT H.

The provision in the Insurance Code of California that the Commissioner "may enter into rehabilitation agreements" is so vague and uncertain as to be unconstitutional.

Connally v. General Constr. Co., 269 U. S. 385, 391; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458, 464; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*,

231 N. Y. 51, 14 A. L. R. 1054, 1056; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239; *Doty v. Love*, 295 U. S. 64.

POINT I.

The joinder of the old company with the Commissioner in the conveyance to the new company was fraudulent and void.

California Civil Code, §3439 and 3442; *Northern P. R. Co. v. Boyd*, 228 U. S. 482, 502-507; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 680; *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 160, 161.

The Contracts of the Petitioners and All Other Policyholders Have Been Impaired in Violation of Article 1, Section 10, of the Federal Constitution. The Contracts of the Life Policyholders Have Been Violated by Compelling Them to Accept the New Company As the Insurer in Place of the Old. The Contracts of the Non-cancellable Accident and Health Policyholders Have Been Impaired by Compelling Them to Take a Reduction of Benefits. The Contracts of Both the Life and Non-cancellable Policyholders Have Been Impaired by Destroying Their Rights to Any Benefits Under the Reorganization Unless They Assent to It.

POINT J.

The contracts of the petitioners and all other policyholders have been impaired in violation of Article 1, Section 10 of the Federal Constitution.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591; *Levy v. Dunn*, 160 N. Y. 504; 73 Am. St. Rep. 699, 701, 702.

POINT A.

The California Courts Never Acquired Jurisdiction of the Pacific Mutual Life Insurance Company of California.

On July 22, 1936,[1] the Insurance Commissioner of California brought a proceeding under §1011 of the Insurance Code of that state to take over the Pacific Mutual Life Insurance Company of California. The case was the first insolvency proceeding under the new code to reach the Supreme Court of California. That court determined the character of the proceeding by holding that it was purely statutory and special.[2] In such a case strict compliance must be had with the statute or the court will acquire no jurisdiction of the *res* or of the parties, and its judgment is absolutely void. (*Murray v. Am. Surety Co. of N. Y.* (C. C. A. 9), 70 Fed. 341, 346.)[3]

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[1]R. 1-9.

[2]R. 1530-1531.

[3]"The fact that there are other provisions of the Code of California which authorize the court, in other proceedings, to appoint a receiver, cannot be said to authorize the court to appoint a receiver in proceedings instituted under the provisions of section 11 of the bank commissioners' act. Courts do not make the laws. They interpret them. If there is no warrant in the statute for the doing of an act, courts cannot supply the defect. There is nothing in the contention of counsel for plaintiff in error that will 'justify us in interploating into the statute something that the legislature has omitted.' People's Sav. Bank v. Superior Court of San Francisco, 103 Cal. 33, 36 Pac. 1015. In whatever light this question may be viewed, we are

That case arose under an early California bank act. It cites cases in point from the Supreme Court of California and from this court to support the unquestioned soundness of its doctrine.[4]

The Commissioner's sworn application filed on July 22, 1936, showed the Pacific Mutual Life Insurance Company of California to have been insolvent on December 31, 1935. The Supreme Court of California has always said of insolvency proceedings: "The proceedings are special and no intendments can be made in favor of the

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brought directly face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. See authorities before cited: Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; East Tennessee V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 5 Sup. Ct. 168; Wells, Jur. Sec. 70; High, Rec., Sec. 43 * * *

"But the judgment of a court having no jurisdiction of the subject-matter or the parties, or the exercise of a power by the court not authorized by the statute in purely statutory proceedings, is utterly null and void, and may be collaterally assailed. Griffith v. Frazier, 8 Cranch. 9; Elliott v. Peirsol, 1 Pet. 333, 340; Wilcox v. Jackson, 13 Pet. 498, 511; Bigelow v. Forrest, 9 Wall. 351; Windsor v. McVeigh, 93 U. S. 274, 282; U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277; Reynolds v. Stockton, 140 U. S. 254, 268, 11 Sup. Ct. 773; Hatch v. Ferguson, 15 C. C. A. 201, 68 Fed. 45; Munday v. Vail, 34 N. J. Law, 419."

Murray v. American Surety Co. of New York (C. C. A. 9), 70 Fed. 341, 346.

[4]*Smith v. Westerfield,* 88 Cal. 374, 378; *East Tennessee V. & G. R. Co. v. Southern Tel. Co.,* 112 U. S. 306, 310.

jurisdiction. Everything bearing upon that question must appear affirmatively."[5]

The section (Cal. Ins. Code, §1011)[6] requires the courts, upon the filing of a proper petition, to appoint the Insurance Commissioner conservator and to vest the title to the properties of the insolvent insurance company in him. No other evidence is required. This is a vital reason for holding the Commissioner strictly to the necessary allegations of jurisdiction.

There was no evidence before the court or nothing by which it could determine that the company was insolvent on July 22, 1936, seven months after the date of insolvency shown in the application. The Supreme Court of California has held that where the first notice of publication to creditors in an insolvency proceedings took place 28 days before the meeting of creditors, when the statute required 30 days, it was not an irregularity, but that because the proceedings were special, the judgment of the court rendered thereon was absolutely void.[7]

The statute (§1011 Cal. Ins. Code) is specific. It says that the Commissioner's verified application must show "conditions to exist." The fact that a condition of insolvency was present on December 31, 1935, was no evidence whatever that it existed on July 22, 1936, the date of the filing of the petition and the making of the orders. The general definition of "exist" as found in all of the

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[5]*McDonald v. Katz,* 31 Cal. 167, 169; *McAllister v. Story,* 7 Cal. 428, 431; *Daman v. Hunt,* 47 Cal. App. 274, 281.

[6]Appendix p. 59.

[7]*McDonald v. Katz,* 31 Cal. 167, 169, 170.

dictionaries is, "to continue to be" or "to live". Without a showing that the insolvency "continued to be", or in the language of the statute, "existed" on July 22, 1936, the court had no jurisdiction to proceed, and for this reason alone every order made in the proceeding by the court is absolutely void. There is little necessity for arguing that due, or any, process can be accorded through a void order. To claim that a state officer may seize the title and possession of property by authority of a void court order is to say that his office gives him powers of a czaristic nature.

POINT B.

All of the Orders Made by the Court Affecting Title to the Assets of the Insurance Company and Approving Their Transfer to the Reorganized Company Were Void Because of the Disqualification of the Judge Who Made the Orders.

Judge Douglas L. Edmonds, the Superior Court judge who purportedly appointed the Insurance Commissioner conservator, vested title in him and approved the reorganization and transfer from the old company to the new by the Commissioner of all of the assets of the old, was the holder of a life policy in the old company.[1]

The Supreme Court of California correctly held in its opinion that all of the orders of Judge Edmonds were absolutely void.[2]

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[1]R. 323.

[2]R. 1526-1527.

The new company, since receiving the properties of the old, by authority of these void orders, on July 22, 1936, has continued from that date to the present to operate, through its own board of directors, the business and affairs of the new corporation, claiming unto itself the title to the assets lodged in it by the admittedly void orders of Judge Edmonds. No other transfer has ever been made.

Although the Commissioner is the sole stockholder of the new company, that gives him no right to operate the business of the new company which now claims title to all assets of the old. The management of that company is by law vested in its board of directors.[3]

A void order was made by Judge Edmonds on July 23, 1936, directing all parties interested to appear and show cause why his void orders, made on the day before, should not be approved. The old company had previously appeared and consented in writing to the making of the void orders by Judge Edmonds.[4] After the notice was given, the petitioners herein and all of the respondents, except the Insurance Commissioner and the old and new corporations, appeared and filed objections to what had

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[3]"POWERS OF DIRECTORS.—Subject to limitations of the articles and of this title as to action to be authorized or approved by the shareholders, all corporate powers shall be exercised by or under authority of, and the business and affairs of every corporation shall be controlled by a board of not less than three directors."

Cal. Civil Code, §305.

[4]R. 33, 48.

been done. It was claimed by respondents, the Insurance Commissioner and the old and new companies, and tacitly approved by the Supreme Court of California, that the consent of the old company and the appearance of the others, making objection to the orders, waived the void character of the orders. That position is not well taken, because there was no jurisdiction shown on the face of the petition. But more important on this point is the uniform rule that where a disqualification of a judge exists, it is jurisdictional and cannot be waived. That is the rule in California.[5] The principle is supported by a wealth of authority.[6] Jurisdiction of the subject-matter cannot be conferred by consent.[7]

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[5]"It is also the uniform rule, under these statutes, that where such disqualification exists, consent of the parties cannot impart validity to the proceedings and that a party to the action who desires to attack them is not estopped from doing so by the fact that he attended during the trial without raising the objection."

Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315, 333.

[6]*McClaughry v. Deming*, 186 U. S. 49, 67, 68; *Oakley v. Aspinwall*, 3 N. Y. 547, 552.

[7]"It is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction."

Marin M. W. Dist. v. North Coast W. Co., 178 Cal. 324, 328.

POINT C.

The Supreme Court of California Erroneously Held That the Void Orders of Judge Edmonds Could Be Approved, and That the Reorganization Under These Void Orders Could Be Validated by Subsequent Approval.

The Supreme Court of California held that although Judge Edmonds' orders were void, their subsequent approval by a qualified judge made them valid.[5]

The Supreme Court of California, after holding that the orders of court were void, nevertheless affirmed the decision upon the theory that the Insurance Commissioner on July 22, 1936, took possession of the assets of the company, which the court held he could do without a court order.[6]

It was impossible in view of the cases from all the courts, California included, to the effect that statutory proceedings must be strictly followed, that Carpenter could start out under §1011 of the Insurance Code, and when he found himself off on tangent, he could be helped out of his dilemma by the court's finding that he did not intend to proceed as he had, but was, on the contrary, proceeding under §1013 by summary seizure.

The Supreme Court of California gives no effect to §1015 providing that "immediately after such seizure the

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[5]R. 1521.

[6]R. 1528.

Commissioner shall institute proceedings as provided under §1011 and thereafter shall proceed in accordance with the provisions of this Article."

"Immediately" does not permit of delay. The record establishes that Carpenter never intended to proceed under §1013.[7] However, if he had done so, he was required "immediately" to file his petition under §1011. The petition he did file was in such form that the court was without jurisdiction to proceed. If he had surmounted those difficulties, he would still have been faced with the void orders of a disqualified judge, upon which everything that has been done in these proceedings, rests.

It was a denial of due process to affect the rights of the policyholders and others interested by void orders. No right can arise from a void order. That is the unquestioned rule in every jurisdiction. It is particularly well founded in California.[8] It is the rule of this court.[9]

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[7] R. 1-9; R. 7; R. 10.

[8] *Ball v. Tolman*, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 123.

[9] *E. Bement & Sons v. Nat. Harrow Co.*, 186 U. S. 70, 88; *Hall v. Coppell*, 7 Wall. 542, 558; *Tumey v. Ohio*, 273 U. S. 510, 522-524, 535.

POINT D.

Judge Edmonds' Orders Were All Illegal and Void Because He Was Prohibited by the California Statute From Sitting Or Acting in the Case.

There are several cases decided by this Court that are applicable, with which the decision of the Supreme Court of California is not in accord. In a leading case on this subject it is held that no rights can arise out of an illegal contract.[10]

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[10]"The instruction given to the jury, that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio,* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Hall v. Coppell, 7 Wall. 542, 558.

The orders of Judge Edmonds were void because they were illegal. Section 170[1] of the Code of Civil Procedure of California prevented a judge with Judge Edmonds' interest from sitting or acting in the case. Where a disqualified judge does sit or act, his acts are void because they are prohibited by law. There are numerous other cases of this Court upholding the general principle.[2]

The cases cited refer to contracts which are illegal. It is well established in California that a judgment is a contract.[3] A judgment, being a contract, the cases referring to illegal contracts apply.

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[1]"No justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

2. In which he is interested as a holder or owner of any capital stock of a corporation or of any bond, note or other security issued by a corporation."

California Code of Civil Procedure, §170.

[2]*Bank of U. S. v. Owens*, 2 Pet. 527, 538; *Meguire v. Corwine*, 101 U. S. 108, 111; *Desmare v. U. S.*, 93 U. S. 605, 611.

[3]*Miller v. Murphy*, 186 Cal. 344, 347; *Jones v. Union Oil*, 218 Cal. 775, 778.

POINT E.

The Subsequent Orders of a Qualified Judge Confirming the Void Orders Still Deny Due Process.

After the reorganization was an accomplished fact and it had been discovered that everything done up to that time was invalid because of the disqualification of Judge Edmonds, Judge Willis, a qualified judge, was brought in.[4] Beginning with the first order of Judge Willis on August 11, 1936, until the final order in the case on December 4 of the same year, the one object and purpose, as shown by the orders made, was to confirm and make valid the void orders of Judge Edmonds.[5]

In an attempt to remove the infirmity from the void orders under which the reorganization had been effected, the respondents had Judge Willis on August 11, 1936, make an order confirming the orders of Judge Edmonds theretofore made, and procured from him the reappointment of the Insurance Commissioner as conservator of the old company, and an order attempting to revest title in him.[6] Of course, at that time there was nothing to conserve, nor any title in the old company to be vested in the Commissioner because he had parted with everything he had by his prior conveyance to the new company.[7] The new company then had the title and possession, still has them, and will continue to keep them, unless this Court should hold that due process was denied the peti-

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[4]R. 323.

[5]R. 322-328; R. 1378-1395.

[6]R. 322-328.

[7]R. 183-92.

tioners and others in like circumstances when their property was taken from them by void orders. It was vital to the Insurance Commissioner that the void orders of Judge Edmonds be confirmed, but it was impossible to vest title in him without first taking back the title from the new company. The orders of Judge Willis confirming title in the new company and vesting title in the Insurance Commissioner are conflicting and destroy themselves.

Judge Willis then, on September 25, 1936, made another order to show cause. But this order was similar to every other order made by him. It merely directed the persons interested to appear and show cause why the void orders of Judge Edmonds should not be approved.[8] Approximately the same persons who answered the first order to show cause came in and objected to the second. The plan was again presented for approval. It was not amended in so far as any policyholder was concerned. As to the policyholders, it remained exactly the same.[9]

The final order of December 4 but confirmed *nunc pro tunc* the orders of Judge Edmonds.[1]

The Supreme Court of California decided that approval of the void orders was due process. If it had not so decited, the reorganization completed on July 22, 1936, would have been upset. It is indeed novel and unusual

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[8]R. 905-913, 906; R. 909.

[9]R. 53-102; R. 888-904; R. 1396-1443.

[1]R. 1387-1388.

that the Supreme Court of California should affirm the orders of Judge Willis confirming the void orders of Judge Edmonds, when the Supreme Court of California holds itself powerless to affirm a void order, and if done, the order is still void.[2]

It must be again mentioned that the Supreme Court of California upholds the Insurance Commissioner's position, established by the void orders of Judge Edmonds, in deciding that the Commissioner could jump the requirements of §1011 of the Insurance Code, organize his new corporation under the implied powers given him under §1043 to enter the rehabilitation agreements, and convey the assets of the old company to the new, without the aid of §1011. That is all judge-made law, applied without process or statutory authority of any sort, and directly opposed to all principles of law regulating the duty of a court in a special statutory proceeding. The decision confers dictatorial powers upon the Commissioner of a character never contemplated by the Insurance Code or by any other statute, and is in plain violation of the Federal Constitution.

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[2]*Ball v. Tolman,* 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123.

POINT F.

The Commissioner Had No Authority To Make Nor the California Courts Jurisdiction To Approve, a Delegation of His Duties As Conservator or Liquidator to a Corpration.

Likewise, the Insurance Commissioner could not delegate his authority to a corporation or appoint an agent or deputy, except as permitted by law. His right to appoint agents or deputies is regulated by §1035 of the Insurance Code.[5] A corporation is ineligible to be an agent or deputy of an Insurance Commissioner, because the General Laws of California provide that no person, except naturalized or native-born citizens may be employed or deputized by the Insurance Commissioner or any other public officer.[6] A corporation is not naturalized or native-born. The decision of the Supreme Court of California, that Carpenter could so appoint or deputize his new corporation, under the Code,

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[5]Appendix p. 63.

[6]"No person except a native born or naturalized citizen of the United States, shall be employed in any department of the state, county, city and county or city government in this state, * * *"

§1, chap. 417, Acts of the Legislature of 1915.

"It shall be unlawful for any person, whether elected, appointed or commissioned to fill any office in either the state, county, city and county or city government of this state, or in any department thereof, to appoint or employ any person to perform any duties whatsoever, unless such person so appointed or employed be a native born or naturalized citizen of the United States, * * *."

§2, chap. 317, Acts of the Legislature of 1915.

is void, because it is a direct violation of law. Here again is another failure to apply the due process guaranteed by the Federal Constitution. An Insurance Commissioner cannot, without violation of due process, accorded by the Federal Constitution, delegate his authority to a corporation whose board of directors manage the company and over whom he would have no control.[7]

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[7]*Schechter v. United States,* 295 U. S. 495.

"The corporation was a going concern. In such case, and in any case where an insurance corporation, whether solvent or insolvent, whether actually operating or not, where the interests of the policy holders require it, the Superintendent of Insurance could manifestly take possession and control of the assets, and in general it may be said that neither he nor a court could delegate to another the duty which the statutes of Missouri cast upon him in liquidating and administering the assets and affairs of the insurance corporation."

Hentschel v. Fidelity & Deposit Co. of Maryland (C. C. A. 8), 87 Fed. (2d) 833, 839.

"It gave them, however, no power to delegate their trust and authority to others; nor to erect a new and arbitrary tribunal, to determine future controveries. If the first, set of referees could proceed in this way, the set empowered by them, might exercise a similar authority; and so *ad infinitum,* compel the parties, without their consent, or control, to resort to a tribunal unknown to our laws. We are, therefore, unanimously of opinion, that the referees exceeded their authority; and as their report, or award, was confirmed, generally, by the Supreme Court, the judgment of that court must, also, be generally, reversed."

Levezey et al v. Gorgas et al., 4 Dall. 71, 74, 75.

POINT G.

The Power to Reorganize Cannot Be Implied From the Right of the Commissioner as Conservator to Enter Into Rehabilitation Agreements.

The Supreme Court of California had, in order to confirm the orders of the lower court, to hold that the implied power to reorganize was granted by §1043 of the Insurance Code, which merely gives the Commissioner, as conservator or as liquidator, the right "to enter into rehabilitation agreements." In order to reach this conclusion the court had to draw upon implied powers said to be granted by the statute in this special proceeding. There are no powers which may be implied from a special statute.

Several New York cases were cited by the Supreme Court of California to support the implied powers it held the Insurance Commissioner of California might exercise under the right "to enter into rehabilitation agreements."[1] There are a number of New York cases construing the New York Insurance Law which hold that rehabilitation contemplates the continuance of the corporate life and activities of the old company. The continuance of the corporate life of the old company or its restoration was not contemplated by the Insurance Commissioner of California in his reorganization. Those cases also hold that rehabilitation means an attempt to conserve and administer the assets of a corporation in the hope of its eventual return from financial distress to solvency.[2] The Insurance

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[1]R. 1535-1537.

[2]*New York Title & Mtg. Co. v. Friedman*, 276 N. Y. S. 72; *In re Title & Mtg. Guarantee Co.*, 274 N. Y. S. 270, 276; *In re New York Title & Mtg. C* , 275 N. Y. 353, 354.

Commissioner of California intended to, and did, kill the old corporation.

It is immaterial whether the New York courts in the cases[3] cited by the Supreme Court of California approved reorganizations or rehabilitations. If reorganizations, there is a provision in the statute of New York providing for them. Where these cases were reorganizations, the courts of New York did not have to draw upon any implied powers, because §52[4] of the New York Insurance Law provides specifically for a reorganization and the method by which it may be accomplished. There is no counterpart in the California Insurance Code.

The Supreme Court of California, after a long and erroneous discussion on the New York cases, winds up with the declaration of an implied power in the Commissioner as follows: "If to rehabilitate such business—a new corporation must be organized, the power clearly exists."[5]

POINT H.

The Provision in the Insurance Code of California That the Commissioner as Conservator "May Enter Into Rehabilitation Agreements" Is So Vague and Uncertain as To Be Unconstitutional.

The phrase under which the reorganization was permitted, "may enter into rehabilitation agreements," is so vague and uncertain, setting no ascertainable standard by which its meaning can be determined, that any action

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[3]R. 1535-1537.

[4]Appendix p. 65.

[5]R. 1537-38.

under it violates the first essential of due process of law.[3] The rule, as stated, is well established and has been reaffirmed in a more recent case.[4]

The respondents undoubtedly will claim that the cases cited were criminal, and that in a civil action the rule is not applicable. That question was considered by the New York Court of Appeals where it was held that the rule is exactly the same in both civil and criminal actions.[5] The New York rule as established by that case has been adopted by this Court and applied by it in a civil case.[6]

Much store has been put by the decision of this Court in *Doty v. Love*[7] because it was held there that the Superintendent of Banks in the State of Mississippi could classify bank creditors, pay certain classes a larger sum on their claims than others, and then reopen the bank by the organization of a new corporation. The case is not applicable in any particular. First, because the Mississippi statute expressly provided in definite terms for

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[3]"And a statute which either forgets or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Connally v. General Constr. Co., 269 U. S. 385, 391.

[4]*Cline v. Frink Dairy Co.*, 274 U. S. 445, 458-464.

[5]*Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 14 A. L. R. 1054, 1056.

[6]*Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239.

[7]*Doty v. Love*, 295 U. S. 64.

everything that was done in that case. Second, the orders of reorganization made by the Mississippi courts were valid and not void, as was the situation here. And third, there was no vagueness or uncertainty in the statute which specifically provided how the superintendent might reopen the bank.

The Supreme Court of California says: "This method of rehabilitation by the formation of a new company is obviously contemplated by the Insurance Code,"[8] forgetting that there are no contemplated procedures under a special statute. There is no power to do anything under a special statute that is not specifically authorized.

Section 1037(d) of the Insurance Code[9] is held by the Supreme Court of California as giving the Commissioner authority to make the transfer of July 22, 1936. The section provides that after the Commissioner has taken possession of property under the insolvency provisions of the Code, he may either as conservator or liquidator, sell, transfer or otherwise dispose of or deal with any real or personal property at its reasonable market value. If the property is worth more than a thousand dollars, the sale can only be made in accordance with the terms and conditions prescribed by the court. The sale and transfer here were made without any order of the court, the attempted orders being absolutely void.

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[8]R. 1535.

[9]Appendix p. 64.

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POINT I.

The Joinder of the Old Company With the Commissioner In the Conveyance to the New Company Was Fraudulent and Void.

The theory upon which the Supreme Court of California held that the Commissioner had the right to make the transfer from the old to the new company was that the old company was insolvent.[1] The Supreme Court of California concedes that the transfer could only have been made by the Commissioner. If done by the old company, the fraudulent conveyance statutes of California would have made the conveyance void.[2] The purpose and intent of these statutes are swept aside by the statement of the Supreme Court of California, "Here the transfer was made pursuant to a valid statute after court approval,"[3] meaning, of course, that the Commissioner's conveyance, although supported only by a void order, was valid.

This is an impossible position, because the Supreme Court of California has held the court's approval of the transfer was absolutely void. That court goes on to say, "Clearly there can exist no intent to defraud when the transfer is made under the terms of a valid statute pursuant to a court order."[4]

The court was in error in making this statement of fact and the conclusion it drew therefrom. The only conveyance ever made by the Commissioner was on July 22, 1936,

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[1]R. 1541.

[2]*Cal. Civil Code*, §3439 and 3442, Appendix p. 59.

[3]R. 1541.

[4]R. 1541

pursuant to the orders of Judge Edmonds made on that day, which the Supreme Court of California held to be absolutely void. The Commissioner's conveyance being held void, it is not helped by the old company's joining therein, because its joinder was void under the fraudulent transfer sections of the California Civil Code.[5]

The decision of the Supreme Court of California is not in accord with an applicable decision of this Court.[6]

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[5] *Cal. Civil Code,* §3439 and 3442, Appendix p. 59.

[6] "Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. *Cf.* San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Grenell v. Detroit Gas Co., 112 Mich. 70, 70 N. W. 413. There is no difference in principle if the contract reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

Northern P. R. Co. v. Boyd, 228 U. S. 482, 502.

We now urge the well established rule of this Court, in anticipation of the argument of respondents that the violation here was judicial rather than legislative. This Court has said, "The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branches of government."[7]

THE CONTRACTS OF THE LIFE POLICYHOLDERS HAVE BEEN VIOLATED BY COMPELLING THEM TO ACCEPT THE NEW COMPANY AS THE INSURER IN PLACE OF THE OLD. THE CONTRACTS OF THE NON-CANCELLABLE ACCIDENT AND HEALTH POLICYHOLDERS HAVE BEEN IMPAIRED BY COMPELLING THEM TO TAKE A REDUCTION OF BENEFITS. THE CONTRACTS OF BOTH THE LIFE AND NON-CANCELLABLE POLICYHOLDERS HAVE BEEN IMPAIRED BY DESTROYING THEIR RIGHTS TO ANY BENEFITS UNDER THE REORGANIZATION UNLESS THEY ASSENT TO IT.

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[7] *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 680; *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 160, 161.

POINT J.

The Contracts of the Petitioners and All Other Policyholders Have Been Impaired in Violation of Article I, Section 10 of the Federal Constitution.

The insolvency provisions of the California Insurance Code became effective in September, 1935. The policies of all of the petitioners, as well as those of practically all of the policyholders in the old company, antedated the effective date of the California Insurance Code. The judgment of the Supreme Court of California gives effect to subsequent legislation which impairs the existing contracts of policyholders, and thus brings the case under the jurisdiction of this Court.

The impairment of the contracts grew out of changing the terms and conditions of the non-cancellable policies, that is, cutting down the benefits to the policyholders.[1]

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[1] "We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or the binding force of the former contract. The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591.

The change in the life policies came in substituting for the old company, without the consent of the policyholders, the new company as the other contracting party to the policyholders' contracts.[2]

Having impaired the contracts of the policyholders in this manner, the plan left any policyholder who did not assent to the plan without right to file his claim with the liquidator of the old company.[3] There was never any liquidator, consequently all of the policyholders were forced to assent to the plan, or be left with absolutely nothing. There could be no greater case of impairment of the obligation of contracts, or a denial of the equal protection of the law. The policyholders had to assent, or see their policies lost. The court, in approving the plan, made no provision whatever for non-consenting policyholders. Giving to the policyholders who failed to assent to the plan, the right to file their claims with the non-existent liquidator was the deprivation of every due process and an impairment of contract.

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[2] *Levy v. Dunn*, 160 N. Y. 504; 73 Am. States Reports 699, 701, 702.

[3] R. 1440-41; R. 1520.

Conclusion.

It is therefore respectfully submitted that this case is one of great public interest, showing a clear violation, by the Supreme Court of California, of due process, as accorded to individuals by the Fourteenth Amendment to the Federal Constitution, and of the impairment of the obligation of contract as prohibited by Article I, Section 10 of the Federal Constitution, and that the case calls for the exercise by this Court of its powers to such end that a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of California, and finally reverse it.

Respectfully submitted,

WM. H. NEBLETT,

R. DEAN WARNER,

Counsel for Petitioners.

ALFRED F. MACDONALD,

ALLAN H. MCCURDY,

VERNON BETTIN,

Of Counsel for Petitioners.